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State of Utah v. Patrick Dean Coando : Brief of Respondent

Utah Court of Appeals

R. Paul Van Dam; Attorney General; Sandra L. Sjogren; Assistant Attorney General; Attorneys for Respondent.
Dixon D. Hindley; Attorney at Law; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 880546-CA
v.	:	
PATRICK DEAN COANDO,	:	Category No. 2
Defendant-Apellant.	:	

BRIEF OF RESPONDENT

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APPEAL FROM REVOCATION OF PROBATION AFTER PLEA IN ABEYANCE, AND ENTRY OF JUDGMENT OF GUILTY IN THE EIGHTH JUDICIAL DISTRICT COURT.

R. PAUL VAN DAM
Attorney General
SANDRA L. SJOGREN
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

DIXON HINDLEY
2035 East 3300 South
Suite 314
Salt Lake City, Utah 84109

Attorney for Appellant

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236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

DIXON HINDLEY
2035 East 3300 South
Suite 314
Salt Lake City, Utah 84109

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

CONSTITUTIONS, STATUTES AND RULES

OTHER AUTHORITIES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Respondent.	:	Case No. 880546-CA
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BRIEF OF RESPONDENT

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a final order of the Eighth District Court, in and for Duchesne County, State of Utah, denying defendant's motion to dismiss for lack of jurisdiction made July 9, 1988, at defendant's sentencing hearing. This appeal was transferred by the Utah Supreme Court to the Utah Court of Appeals. This court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(e) and (h) (1971),

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the State's jurisdiction was proper in this matter because an essential element of each aspect of defendant's offense of issuing bad checks was committed on property within the State's jurisdiction?

2. Whether defendant may properly be considered to be an Indian for purposes of federal criminal jurisdiction and whether Roosevelt, Utah may properly be considered to be part of federally recognized Indian Country?

3. Whether defendant's crimes must be punished as a class B misdemeanor at the very minimum?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

18 U.S.C. § 1151 (1982):

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the boarders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1152 (1982):

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who; has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

18 U.S.C. § 1153 (1982):

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape,

incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny, within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

As used in this section, the offenses of burglary and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

In addition to the offenses of burglary and incest, any other of the above offenses which are not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

Utah Code Ann. § 76-1-201 (1978):

(1) A person is subject to prosecution in this state for an offense which he commits, while either within or outside the state, by his own conduct or that of another for which he is legally accountable, if:

(a) The offense is committed either wholly or partly within the state; or

(b) The conduct outside the state constitutes an attempt to commit an offense within the state; or

(c) The conduct outside the state constitutes a conspiracy to commit an offense within the state and an act in furtherance of the conspiracy occurs in the state; or

(d) The conduct within the state constitutes an attempt, solicitation, or conspiracy to commit in another jurisdiction an offense under the laws of both this state and such other jurisdiction.

(2) An offense is committed partly within this state if either the conduct which is an element of the offense, or the result which is such an element, occurs within this state. In homicide the "result" is either the

physical contact which causes death, or the death itself; and if the body of a homicide victim is found within the state, the death shall be presumed to have occurred within the state.

(3) An offense which is based on an omission to perform a duty imposed by the law of this state is committed within the state regardless of the location of the offender at the time of the omission.

Utah Code Ann. § 76-6-505 (1988)

(1) Any person who issues or passes a check or draft for the payment of money, for the purpose of obtaining from any person, firm, partnership, or corporation, any money, property, or other thing of value or paying for any services, wages, salary, labor, or rent, knowing it will not be paid by the drawee and payment is refused by the drawee, is guilty of issuing a bad check or draft.

For purposes of this subsection, a person who issues a check or draft for which payment is refused by the drawee is presumed to know the check or draft would not be paid if he had no account with the drawee at the time of issue.

(2) Any person who issues or passes a check or draft for the payment of money, for the purpose of obtaining from any person, firm, partnership, corporation, any money, property, or other thing of value or paying for any services, wages, salary, labor, or rent, payment of which check or draft is legally refused by the drawee, is guilty of issuing a bad check or draft if he fails to make good and actual payment to the payee in the amount of the refused check or draft within 14 days of his receiving actual notice of the check or draft's nonpayment.

(3) An offense of issuing a bad check or draft shall be punished as follows:

(a) If the check or draft or series of checks or drafts made or drawn in this state within a period not exceeding six months amounts to a sum of not more than $200, such offense shall be a class B misdemeanor.

(b) If the check or draft or checks or drafts made or drawn in this state within a period not exceeding six months amounts to a sum exceeding $200 but not more than $300, such offense shall be a class A misdemeanor.

(c) If the check or draft or checks or drafts made or drawn in this state within a period not exceeding six months amounts to a sum exceeding $300 but not more than $1,000, such offense shall be a felony of the third degree.

(d) If the check or draft or checks or drafts made or drawn in this state within a period not exceeding six months amounts to a sum exceeding $1,000, such offense shall be a second degree felony.

STATEMENT OF THE CASE

On October 26, 1987, defendant was charged with the crime of issuing bad checks, a third degree felony, in violation of Utah Code Ann. § 76-6-505 (1953, as amended) (R. 2). Defendant entered a guilty plea to the charge on November 23, 1987, before the Eighth Judicial District Court, in and for Duchesne County, the Honorable Dennis L. Draney, presiding (R. 98). Subsequent to the guilty plea, defendant entered into a plea in abeyance agreement (R. 99). On April 25, 1988, defendant was found to have violated the agreement and a judgement of guilty was entered (R. 60-61). At an order to show cause hearing held on July 19, 1988, defendant made a motion to dismiss for lack of jurisdiction, which motion was denied and sentence was imposed (R. 133-34, 150-51). Notice of appeal by defendant was filed on August 5, 1988 (R. 74).

STATEMENT OF FACTS

An amended information was filed by the Duchesne County Attorney in the Seventh Circuit Court of the State of Utah, Duchesne County, Roosevelt Department on October 26, 1987, which charged defendant with the crime of issuing bad checks, a third degree felony, in violation of Utah Code Ann. § 76-6-505 (1953, as amended) (R. 2). The crimes were alleged to have been committed at Roosevelt, Duchesne County, Utah and Vernal, Uintah County, Utah (R. 2). Seven checks were written to the establishments of Safeway, Tri-Mart, Vernal Drug, and Triangle Oil, at a total amount of $354.26 (R. 2). Defendant pled guilty to these charges on November 23, 1987 and an abeyance agreement was entered into, under which defendant was to make restitution payments and to refrain from any other similar conduct or legal violations (R. 87, 98).

On April 25, 1988, defendant was found to have violated the agreement for failure to make the required restitution payments and issuing additional bad checks (R. 60-61). Subsequently, the plea in abeyance was set aside and judgment was entered on the guilty plea (R. 61).

On July 19, 1988, the Eighth Judicial District Court heard an order to show cause why the previously given probation should not be revoked and why the sentence previously suspended should not be imposed (R. 132). Defendant moved to dismiss for lack of jurisdiction on the grounds that defendant is a Uintah Indian and the offenses were committed on the Uintah-Ouray Reservation (R. 134-35). Defendant proffered only his own testimony in support of his assertions (R. 135).

Defendant testified that although his permanent address was a post office box in Vernal, Utah, he resided wherever his job took him (R. 136). He also testified that he and five other Indians have a casing company called F.A.C.S. (R. 137). Further, defendant explained that his father is full-blooded Shoshoni Indian, his mother is enrolled in the Uintah Band, and defendant, himself, was one-fourth shoshoni and three-eighths Uintah Indian (R. 137).

Upon cross-examination, defendant maintained that he was a Uintah Indian and that he possessed enrollment cards from the Uintah and Wind River (Shoshoni) Reservations (R. 140). However, no enrollment cards were produced, or admitted into evidence (R. 142, 43). On cross-examination defendant also admitted that Vernal Drug is located on State ground (R. 141).

After hearing defendant's proffers, the Eighth Judicial District Court denied defendant's motion, finding that the evidence did not support defendant's claim that he is an enrolled member of the Ute Indian Tribe (R. 146). Additionally, the court noted that some of the bad checks were written on State land and all of the checks were drawn on a bank which is not on the reservation (R. 146-47). Defendant was sentenced to the Utah State Prison for a term not to exceed five years (R. 151).

SUMMARY OF ARGUMENT

The State's jurisdiction in this matter was proper regardless of defendant's assertion that he is an Indian for federal jurisdictional purposes and the offenses occurred in Indian Country. Essential elements of each bad check offense

that of the drawee's refusal of payment, occurred at the First Interstate Bank of Vernal, which is located within the State's jurisdiction. Statutory law in Utah and case law in sister jurisdictions supports the State's assertion of jurisdiction in matters such as the instant case. Thus, this Court need not reach the issue of whether defendant is an Indian.

Alternatively, defendant's proffered evidence failed to establish that he is recognized as an Indian for federal criminal jurisdiction purposes. His illogical testimony concerning his Indian blood heritage and failure to offer credible evidence concerning his recognition by the tribe as an Indian support the court's conclusion that defendant failed to meet his burden in establishing himself as an Indian. The State also reasserts that the City of Roosevelt, Utah is not part of the Uintah-Ouray Reservation based upon its arguments in the case of State v. Perank which are currently under advisement before the Utah Supreme Court. The State submits that this Court should at least refrain from a determination of the issue until the Supreme Court has ruled.

Finally, if this Court accepts defendant's arguments and finds that the State's jurisdiction was improperly exercised in this case, the State submits that defendants' criminal acts must at least be punishable by the State as a class B misdemeanor. Defendant has pled guilty to issuing these bad checks, two of which, totalling $70.00 were passed on state land in every element of the offense.

ARGUMENT

POINT I

THE STATE PROPERLY EXERCISED JURISDICTION REGARDLESS OF DEFENDANT'S CLAIMS THAT HE IS AN INDIAN AND THE ILLEGAL ACTS TOOK PLACE IN INDIAN COUNTRY.

Defendant's claims that jurisdiction in this matter should properly be before the Ute Tribal Court or in an appropriate Federal Court is based on his assertions that he is an Indian and the crimes took place on an Indian Reservation. (See Br. of App. at 4.) However, whether defendant may legally be recognized as an Indian and whether certain localities such as Roosevelt, Utah are part of Indian Country need not be addressed by this Court. Jurisdiction is conferred by Utah Code Ann. §§ 76-1-201 (1978) and 76-6-505 (1988).

Utah Code Ann. § 76-1-201 (1978) directs:

> (1) A person is subject to prosecution in this state for an offense which he commits, while either within or outside the state, by his own conduct or that of another for which he is legally accountable, if:
>
> (a) The offense is committed either wholly or partly within the state;
>
> (2) An offense is committed partly within this state if either the conduct which is an element of the offense, or the result which is such an element, occurs within this state.

Utah Code Ann. § 76-6-505 (1988) defines the elements of the crime of issuing a bad check or draft as follows:

> (1) Any person who issues or passes a check or draft for the payment of money, for the purpose of obtaining from any person, firm, partnership, or corporation, any money, property, or other thing of value or paying for any services, wages, salary, labor, or

> rent, knowing it will not be paid by the drawee and payment is refused by the drawee, is guilty of a issuing a bad check or draft.

(Emphasis added.) Therefore, according to these statutes, the State may correctly claim jurisdiction over a charge of issuing bad checks if any of the elements of the crime, i.e. (1) passing the check; (2) knowing that the check will not be honored; and (3) refusal by the drawee to pay, have been committed within the State.

Defendant's guilty plea, entered November 23, 1987, to the third degree felony of issuing bad checks in an amount exceeding $300 but less than $1,000 (Utah Code Ann. § 76-6-505(3)(c) (1988)) is based upon seven checks written to Safeway, Tri-Mart, Vernal Drug, and Triangle Oil (R. 2). Although some of these establishments are located in Roosevelt (which defendant argues is on the Uintah and Ouray Indian Reservations) (see Brief of App. at 5-6), the First Interstate Bank of Vernal, drawee of each of these bad checks, is clearly within state jurisdiction because Vernal, Uintah County, Utah, is not part of Indian Country. Ute Indian Tribe v. State of Utah, 521 F.Supp. 1072, 1188, aff'd in part, reversed in part, 716 F.2d 1298, on rehearing, 773 F.2d 1087, cert. denied, 107 S. Ct. 596 (1986). Therefore, although there may be elements of the crime that occurred on land arguably part of Indian Country, the element of the drawee refusing payment occurred on land that is definitely not in Indian country. Accordingly, § 76-1-201 directs that defendant is subject to prosecution within the State regardless of his assertions that he is an Indian and the checks passed to

businesses in Roosevelt, Utah were located on land subject to federal jurisdiction.

In the recent case of State v. Lane, 771 P.2d 1150 (Wash. 1989), the Supreme Court of Washington considered whether the State of Washington had jurisdiction to try three defendants on charges of aggravated first degree murder when the victim was killed at Fort Lewis, Washington, land held under exclusive federal jurisdiction. 771 P.2d at 1151. The court concluded that the "State of Washington may exercise jurisdiction over a criminal offense if an essential element of the offense occurred within the state but outside the land ceded to the federal government (where the offense culminated)." Id. at 1152. Washington's statutory language mirrors the statutory language of Utah previously quoted. Specifically, RCW 9A.04.030(1) (1988) states that "[t]he following persons are liable for punishment: (1) A person who commits in the state any crime, in whole or in part." The court explained that an offense "is committed 'in part' in Washington, within the contemplation of the criminal jurisdiction statute, when an 'essential element' of the offense has been committed here." 771 P.2d at 1153-54; citing, State v. Moore, 189 Wash. 680, 690-92, 66 P.2d 836 (1937); State v. Swanson, 16 Wash.App. 179, 180, 554 P.2d 364 (1976), review denied, 88 Wash.2d 1014, cert. denied, 434 U.S. 967, (1977).

In the Washington case, the State conceded that "the fatal wounds were inflicted, and the victim's death occurred, in this area of exclusive federal jurisdiction." 771 P.2d at 1153. However, the State asserted that the element of "premeditation"

occurred within the State's jurisdiction, and that this element was an essential component of the charge. Id. The Supreme Court of Washington agreed:

> premeditation is an element separate and distinct from the specific intent to kill required for first degree murder; it also distinguishes first degree murder from second degree murder. The failure of the state to sufficiently establish premeditation has been held to require reversal of a conviction for aggravated first degree murder. Clearly, therefore, premeditation constitutes an essential element of the crime of aggravated first degree murder.
>
> It follows from the foregoing, that if the State makes a sufficient showing to establish that premeditation occurred in this state outside Fort Lewis before the infliction of the fatal wounds at Fort Lewis, then the State of Washington has jurisdiction to try petitioners for the crime of aggravated first degree murder.

771 P.2d at 1154-55. In the case at hand, the element of the crime of issuing bad checks that the drawee refused payment is essential because without the final step of refusal of payment by the drawee, the crime of issuing bad checks does not occur. If the bank actually made payment, or the establishment never tendered the check for payment, an essential element would be lacking and the defendant could not be found guilty of the offense.

In the instant case, this essential element of the crime was completed. With the First Interstate Bank of Vernal's refusal of payment, defendant's offense reached fruition. The State's jurisdiction over defendant should be affirmed according to § 76-1-201 because this offense was committed "partly within the state." For this reason, it is irrelevant whether defendant

is an Indian or whether some other elements of the crime occurred on the Reservation and this Court need not address either of these issues.

POINT II

THE STATE PROPERLY ASSERTED ITS JURISDICTION OVER DEFENDANT IN THAT THE CRIMES DID NOT OCCUR IN INDIAN COUNTRY AND DEFENDANT HAS NOT SATISFIED THE FEDERAL JURISDICTIONAL REQUIREMENTS OF PROVING HIMSELF AN INDIAN.

As defendant points out in his brief, whether exclusive federal criminal jurisdiction exists depends upon two prongs (See Brief of App. at 5.) These prongs are whether the criminal acts occurred in "Indian Country" as defined by 18 U.S.C. § 1151 (1976) and whether defendant may be found to be "Indian" for purposes of jurisdiction under federal law. See United States v. Broncheau, 597 F.2d 1260, 1262-64 (9th Cir. 1979), cert. denied, 444 U.S. 859 (1980). Defendant failed to establish either of these prongs, and, if this court reaches these issues, it may still find that jurisdiction was properly asserted by the State.

A. Roosevelt, Utah Is Not Located In Indian Country.

This issue has previously been extensively briefed and argued in the Utah Supreme Court in State v. Clinton Perank, Case No. 860196. The Court took Perank under advisement on October 11, 1988. This Court may wish to refrain from ruling on this issue, should it become necessary to address the issue, until the Supreme Court has ruled. In any event, Appendix A contains the State's argument on this issue in the Perank case. The State reasserts the argument in this Court that Roosevelt is not in Indian country and incorporates Appendix A as its analysis of the issue.

B. Defendant Failed To Make The Necessary Showing That He Is An Indian For Purposes of Exclusive Federal Criminal Jurisdiction.

While 18 U.S.C. §§ 1152 and 1153 preclude state criminal jurisdiction over "Indians" who commit crimes on Indian reservations, defendant cannot avail himself of that defense because he did not meet his evidentiary burden to establish that he is an Indian. The testimony of defendant at the Order to Show Cause Hearing on July 19, 1988 concerning his status as an Indian consisted of the following:

> Q: (by Defense) And are you an Indian?
>
> A: Yes, I am
>
> Q: What is your affiliation?
>
> A: My father in [sic] one-half--my father in [sic] one full--he is four-fourths Shoshoni Indian off the Wind River Reservation, and I'm one-fourth Shoshoni off the Wind River Reservation. My mother is enrolled in the Uintah Band over here on the Ute--what they call the Ute Tribe Reservation, but she is in the Uintah Band, and so am I. I'm three-eights Uintah Indian.
>
> Q: Does the tribe recognize you as a member?
>
> A: They do.

(R. 137.)

This testimony fails to offer any objective proof of defendant's recognition by any tribe, such as enrollment cards which were never produced or offered into evidence, or the testimony of any other tribal members or authorities. Further, defendant's testimony is internally inaccurate and is, therefore, incredible. Defendant testified that his father is full-blooded Shoshoni Indian, yet defendant states he is only one-fourth

Shoshoni. He also states that he is three-eighths Uintah Indian. Presumably this would make defendant's mother three-quarters Uintah Indian and leave her one-quarter unknown to this court. If defendant's father is, in fact, full-blooded Shoshoni and his mother is three-quarters Uintah and one-quarter unknown, defendant should logically be one-half Shoshoni, three-eighths Uintah and one-eighth unknown. However, defendant's incredible assertions are that he is one-quarter Shoshoni, three-eighths Uintah, leaving another three-eighths unknown. By his description, his largest tribal claim by blood, the Shoshoni tribe, has become the smallest blood connection.

Aside from these inaccuracies, defendant only asserted that "the tribe" recognized him as a member. He did not specify which tribe he was referring to. Surely, defendant cannot claim that because the Shoshoni tribe recognizes him, the Ute Tribe has jurisdiction over his actions on the Ute Reservation. When defendant was asked by the court if he had any further evidence or testimony to present, he simply reasserted his position that "the facts state for themselves [defendant] is a member of the Uintah Band, that the incidents alleged took place on the reservation, and that according to federal Indian law the court is without jurisdiction." (R. 143). He did not present a Wind River enrollment card even though he earlier stated that he had such a card with him. Nor did he present a Ute enrollment card.

That evidence does not qualify defendant as an Indian for purposes of avoiding state jurisdiction under 18 U.S.C. §§ 1152 and 1153. As a preeminent authority on Indian law has

stated: "Several important Indian statutes, such as the federal criminal jurisdiction statutes [citing 18 U.S.C. §§ 1152 and 1153] . . . use the word "Indian" without further definition. . . . [T]he courts have taken the position in this situation that the term 'Indian' means an individual who has Indian blood and who is regarded as an Indian by his or her tribe or Indian community." F. Cohen, Handbook of Federal Indian Law 24 (1982 ed.) (footnotes omitted and emphasis added). Defendant's evidence leaves in doubt his status vis-a-vis the Tribe.

"Tribal membership as determined by the Indian tribe or community itself is often an essential element. In fact, a person of complete Indian ancestry who has never had relations with any Indian tribe may be considered a non-Indian for some legal purposes." Id. at 19 (footnote omitted). "Some people therefore can be an Indian for one purpose but not for another." Id. at 26. And Cohen specifies that one who is an "Indian" for some purposes may not necessarily qualify to avoid state criminal jurisdiction. Id.

"[T]wo elements must be satisfied before it can be found that the appellant is an Indian under federal law. . . [He must have] a significant percentage of Indian blood . . . [and he] must be recognized as an Indian either by the federal government or by some tribe or society of Indians." Goforth v. Oklahoma, 644 P.2d 114, 116 (Okla.Crim.App. 1982). In that case, "[t]he record [was] devoid . . . of any evidence tending to show that the appellant was recognized as an Indian. Absent such recognition, we cannot hold that [he] is an Indian under federal

law . . . ." Id. Since the appellant was not an Indian under 18 U.S.C. §§ 1152 and 1153, those statutes did not preempt state jurisdiction. Id.

Having failed to establish the nature and extent of any relationship he may have with the tribe, defendant in this case also has not shown that he is an Indian. Utah's jurisdiction therefore was not preempted. Cf. New Mexico v. Cutnose, 532 P.2d 896, 898 (N.M. Ct.App. 1974) ("The jurisdictional challenge was to a court exercising general jurisdiction. . . . The burden was upon defendant to demonstrate a lack of jurisdiction in the district court.") Since he sought to invoke a special exception to the State's jurisdiction, he was the moving party and had the burden of producing prima facie evidence that he is an Indian.

Such facts were peculiarly available to defendant. He, far more easily than the State, could produce evidence of his tribal relations. Indeed, the State otherwise would have to try to prove a negative (i.e., that defendant is not an Indian), and would have to meet that difficult burden in more or less an evidentiary vacuum, on nothing more than the defendant's bald allegation. Defendant had the burden of going forward with sufficient evidence to show prima facie that he is an Indian.

"The party who asserts a fact has the burden to establish the fact." Yeazell v. Copins, 98 Ariz. 109, 402 P.2d 541, 546 (1965). "The ordinary rule, based on considerations of fairness, does not place the burden upon a litigant to establish facts peculiarly within the knowledge of his adversary." United States v. New York, N.H. & H.R. Co., 355 U.S. 253, 256 n.5

(1957); Browzin v. Catholic University, 527 F.2d 843, 849 (D.C. Cir. 1975). In other words, "the party in the best position to present the requisite evidence should bear the burden of proof . . .," United States v. Continental Ins. Co., 776 F.2d 962, 964 (11th Cir. 1985), and "[t]he party with the best knowledge normally sustains the burden." Lindahl v. Office of Personnel Management, 776 F.2d 276, 280 (Fed. Cir. 1985).

If defendant did not have the burden of production, the State would have the extreme burden of proving a negative, which burden the law does not favor. Trans-American Van Service v. U.S., 421 F.Supp. 308, 331 (N.D. Tex. 1976). And the State would have to prove that negative without the defendant's having to make any evidentiary showing whatever. "In that situation it would not make too much sense to thrust upon the [State] the burden of disproving the truth of the bare [allegation]." Lindahl, 776 F.2d at 780.

United States v. Hester, 719 F.2d 1041 (9th Cir. 1983), illustrates the principle that a criminal defendant has the initial burden on whether or not he is an Indian. That case, like the instant one, involved 18 U.S.C. § 1152. Hester argued against federal jurisdiction because the statute's coverage does "not extend to offenses committed by one Indian against . . . another Indian" and the indictment had not alleged Hester's non-Indian status. Id. at 1042.

The Government argued that it did not have the "burden of alleging and establishing the non-applicability of this exception to § 1152." Id. The court agreed, citing, McKelvey v.

United States, 260 U.S. 353, 357 (1922) ("it is incumbent on one who relies on such an exception to set it up and establish it"). As the court correctly noted, "It is far more manageable for the defendant to shoulder the burden of producing evidence that he is a member of a federally recognized tribe than it is for the Government to produce evidence that he is not. . . ." Id. at 719 F.2d 1043. The Government does not have "the burden of going forward on that issue." Id.

Similar analysis, although under a different (civil) statute, prevailed in Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), cert. denied, 444 U.S. 866 (1979). The court held against the tribe's position on burden of proof, in part because the tribe's opponent otherwise would "have to try to prove a negative." Id. at 590.

In this case, defendant is the party who would benefit from proof that he is an Indian, and he therefore has the burden of establishing that fact. In re Chicken Antitrust Litigation, 560 F.Supp. 1006, 1008 (N.D. Ga. 1982). We acknowledge that the State ultimately has the burden of persuasion on jurisdiction under Utah Code Ann. § 76-1-501(3),[1] but that does not alter defendant's burden of producing evidence in the first instance to establish prima facie that he is an Indian.[2] If he meets the

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[1] Section 76-1-501(3) states: "The existence of jurisdiction and venue are not elements of the offense but shall be established by a preponderance of the evidence."

[2] That the State has the burden of persuasion on jurisdiction does not necessarily mean it has the burden of going forward on that issue. Frankel v. Wyllie & Thornhill, Inc. 537 F.Supp. 730, 735 (N.D. Va. 1982). Section 76-1-501(3) leaves it to the court to delineate whose burden it is to go forward with evidence in a

burden, "then the ultimate burden of proof remains, of course, upon the Government." Hester, 719 F.2d at 1043.

The State did not have the burden of refuting defendant's "Indian-status" allegation until he had given it a full prima facie basis in fact. And the record shows defendant failed to present evidence on all facts necessary to make a prima facie showing.

POINT III

IN THE EVENT THIS COURT ACCEPTS DEFENDANT'S CLAIMS THAT THE OFFENSE OCCURRED IN INDIAN COUNTRY AND DEFENDANT IS AN INDIAN FOR FEDERAL JURISDICTIONAL PURPOSES, THE PROPER REMEDY IS TO REDUCE THE CHARGE TO A CLASS B MISDEMEANOR.

Initially, the State reasserts it's position that the State's jurisdiction was proper in the instant case because an essential element of each illegally passed check occurred in Vernal, Utah, which is off of the reservation. Alternatively, the State maintains that no elements of the offense occurred in Indian Country and defendant has not established himself as an Indian for purposes of federal jurisdiction. However, if this court accepts defendant's claims, defendant's offense of issuing bad checks, to which he entered a guilty plea on November 23,

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[2] Cont. particular case, and that burden may shift with the circumstances. "[T]here is not and cannot be any one general solvent for [allocating] the burden of proof in all cases. It is merely a question of policy and fairness based on experience in the different situations." Mashpee Tribe, 592 F.2d at 589 n.13, quoting, 9 Wigmore on Evidence, § 2486, p. 274 (3d ed. 1940) (bracketed word in the court's opinion). In some cases, the State may have the burden of production as well as the burden of persuasion, but not here. Fairness and efficiency require that the Indian criminal defendant have the burden of production on his Indian status.

1987, should be punished as a class B misdemeanor. Two checks, one for $20 and one for $50, were passed to Vernal Drug (R. 2). This establishment, as defendant admits, is not located on the reservation. (See Brief of App. at 5-6.) Therefore, according to Utah Code Ann. §§ 76-1-201 and 76-6-505, the State's assertion of jurisdiction over the offenses committed in Vernal, Utah is proper and defendant should be punished for the commission of a class B misdemeanor at the very least.

CONCLUSION

Based upon the foregoing, the State requests this Court to uphold the jurisdiction of the District Court and affirm defendant's conviction.

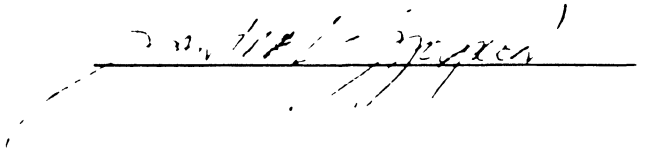
RESPECTFULLY submitted this 26th day of June, 1989.

R. PAUL VAN DAM
Attorney General

SANDRA L. SJOGREN
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Dixon Hindley, attorney for appellant, 2035 East 3300 South, Suite 314, Salt Lake City, Utah 84109, this 21st day of June, 1989.



APPENDIX A

Basin. And finally, given the state of the record, it cannot be said that Perank's status as an Indian under 18 U.S.C. Sections 1152 and 1153 was not established below.

ARGUMENT

I. THE OFFENSE WAS NOT COMMITTED WITHIN INDIAN COUNTRY AND THE STATE DISTRICT COURT HAD JURISDICTION

Perank claims his crime was committed within Indian country as defined by 18 U.S.C. 1151, and that--coupled with the allegation that he is an Indian--deprived the state district court of jurisdiction. The following section of this brief will demonstrate that the crime did not take place within Indian country because the original Uintah reservation has been disestablished and today consists only of "trust lands," and Perank's offense was committed outside those trust lands. We first examine the principles established by the United States Supreme Court for determining whether a reservation has been disestablished. This is followed by an examination of the legislation and facts and circumstances surrounding the opening of the Uintah reservation which show that it has been disestablished.

A. General Principles Governing Disestablishment

Pursuant to the Act of May 27, 1902 (32 Stat. 245, 263), as amended, a Presidential Proclamation issued on July 14, 1905 (34 Stat. 3119), providing that all the unallotted and unreserved lands of the original Uintah reservation were restored to the public domain and opened for public settlement under the homestead and townsite laws. It is settled law that some surplus land acts diminished reservations, see, e.g., Rosebud Sioux Tribe

v. Kneip, 430 U.S. 584 (1977), and DeCoteau v. District County Court, 420 U.S. 425 (1975), and other surplus land acts did not, see, e.g., Mattz v. Arnett, 412 U.S. 481 (1973), and Seymour v. Superintendent, 368 U.S. 351 (1962). Solem, 465 U.S. at 468-69. As explained in Solem, the Supreme Court has established a "fairly clean analytical structure" for distinguishing those surplus land acts that of their own force effected an immediate diminishment of the reservation from those acts that simply permitted non-Indians to purchase land within an existing reservation and left to another day the actual redrawing of its boundaries (id. at 470). Because Appellant does no more than submit the decision of the en banc majority to support his contention that the crime took place in Indian country, we must examine that decision in light of controlling Supreme Court precedents.

1. The en banc majority's decision in Ute Indian Tribe that the historic reservations were not disestablished ultimately rests on the proposition that restoration to public domain language is not the same as a congressional state of mind to disestablish and does not reliably establish the clear and unequivocal evidence of Congress' intent to change boundaries. In so holding, the majority acknowledged that this had not been the law prior to Solem and, indeed, all of the judges who had considered this case before Solem agreed that such language was synonymous with disestablishment. See Ute Indian Tribe, 716 F.2d at 1303 (panel opinion); id. at 1316 (Doyle, J., dissenting); and 521 F.Supp. at 1122 (district court opinion). To the en banc majority, however, Solem altered this long-standing principle of

interpretation and marked a new direction in the Supreme Court's view of turn-of-the-century legislation concerning Indian reservations. Thus, the en banc majority concluded that "[u]nder the Solem standards neither the Uncompahgre Reservation nor the Uintah Reservation has been disestablished or diminished by any of the congressional enactments in question". Ute Indian Tribe, 773 F.2d at 1090-91.

The majority's reading of Solem is not correct. Solem did not establish new "standards" and it did not alter the principles announced in Seymour, Mattz, DeCoteau and Rosebud, which the Court in Solem described as having "established a fairly clean analytical structure for distinguishing those surplus land acts that diminished reservations from those acts that simply offered non-Indians the opportunity to purchase lands within established reservation boundaries." 465 U.S. at 470. Although the Court has added several relevant factors to the traditional indicia of legislative intent, including how Congress and the Department of the Interior have treated the area in later years and whether the area has "lost its Indian character" because it is "predominately populated by non-Indians" (Solem, 465 U.S. at 471 & n.12), the Court has not departed from the governing principle "that congressional intent will control" (Rosebud, 430 U.S. at 586, and Solem, 465 U.S. at 470-71).

In determining whether an Indian reservation exists, one must therefore first examine the face of the relevant legislation. Rosebud, 430 U.S. at 587. In each of the disestablishment cases

decided before Solem, the Court expressly acknowledged that restoration to public domain constitutes firm and unequivocal language of disestablishment. See Rosebud, 430 U.S. at 589 & n.5; DeCoteau, 420 U.S. at 426-27, 446; Mattz, 412 U.S. at 504, n.22; Seymour, 368 U.S. at 354-55; and United States v. Pelican, 232 U.S. 442, 445-46 (1914). In the clearest possible terms, the Court stated that restoration to the public domain meant "stripped of reservation status." DeCoteau, 420 U.S. at 446.

The decisions in Rosebud and Decoteau fairly reflect the view of the Court on this point. Although in both cases the Court was divided on the question whether the particular area involved had retained reservation status, the Court was unanimous that such restoration language amounted to a unequivocal expression of an intent to disestablish. See Rosebud, 430 U.S. at 589, n.5; id. at 618 (Marshall, J., dissenting); DeCoteau, 420 U.S. at 426-27, 446; id. at 463 (Douglas, J., dissenting). Indeed, Justice Marshall--who wrote the Court's opinion in Solem--observed in his dissenting opinion in Rosebud that an 1889 surplus land act expressly restoring lands to the public domain (25 Stat. 896, sec. 21) was "yet another example" of "'clear language of express termination. . .'." Id., 430 U.S. at 618.

Solem did not reject or alter this firmly-established rule of interpretation. The crucial provision interpreted in Solem did not provide for the restoration of the surplus lands to the public domain, nor was any such language contained in the operative portions of the Solem legislation. Instead, a reference to "public domain" appeared in a subsequent section providing that

tribal members could harvest timber on certain portions of the opened lands, "only as long as the land remained part of the public domain." Sec. 9, 35 Stat. 464. The Court acknowledged that even this oblique reference was evidence of disestablishment; it found, however, that because the phrase was "isolated," it could not be dispositive. Solem, 465 U.S. at 475.

In justifying its expansive interpretation of Solem, the en banc majority also relied upon a footnote in Solem stating that there was "considerable doubt as to what Congress meant in using..." public domain terminology in the Solem legislation since the affected lands "could be conceived of as being in the 'public domain' inasmuch as they were available for settlement" (id., 465 U.S. at 475, n.17). It is evident, however, that the Court did not intend this statement in Solem to overrule its prior decisions and to discount the significance of public domain language in every other instance. The Court had already indicated that such language supported the disestablishment claim and, in any event, the Court would hardly have confined its comments to one sentence in a footnote had it intended such a drastic departure from the views, expressed by both the majority and dissenting Justices in prior cases, regarding the significance of such restoration language.

The en banc majority's decision to the contrary also overlooks the Solem Court's later observation, in the context of subsequent jurisdictional history, that:

> Unentered lands were considered a part of the reservation. They were available for allotment to tribal members, they were leased for the benefit of

> the tribe, and they were specifically defined as different from land in public domain.

Id. at 480, n.25 (emphasis added), quoting F. Hoxie, Jurisdiction on the Cheyenne River Reservation: An Analysis of the Causes and Consequences of the Act of May 29, 1908, at 87 (undated). The reference to public domain in the quoted passage can only be understood on the basis that public domain and reservation status are mutually exclusive.[16] In short, Solem does not signal the Supreme Court's abandonment of its previous interpretations of restoration to public domain language. Such language continues to be the clearest expression of disestablishment.

2. Although Oregon Department of Fish and Wildlife v. Klamath Indian Tribe, 105 S.Ct. 3420 (1985),[17] required that the various acts involved here--which contain identical operative language--should be interpreted to have the same effect, the en banc majority did not do so and thereby compounded its error. In this regard, there was no dispute that the so-called "Gilsonite

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16. This is how the author of the quoted study understood it, as he considered public domain status to be crucial in interpreting the subsequent jurisdictional treatment of the area involved. See Hoxie, supra, at 87, 88. Thus, he stated that it was necessary to determine whether the area in question was "administered as part of the public domain. . . ." Id., at 87.

17. In that case, the issue was whether that Tribe retained treaty hunting and fishing rights in an area ceded under a 1901 cession agreement. See 105 S.Ct. at 3422. In interpreting this agreement, the Court initially looked to the construction given a prior treaty with the same Tribe containing similar cession language. See 105 S.Ct. at 3422, 3428. As the Court there explained, "[p]resumptively, the similar language used in the 1901 Cession Agreement should have the same effect." 105 S.Ct. at 3428.

Strip"--a 7,000-acre tract located on the edge of the original Uintah reservation--was disestablished by the Act of May 24, 1888 (25 Stat. 157). See, e.g., Ute Indian Tribe, 773 F.2d at 1098 (Seymour, J., concurring). Compare with district court opinion, id., 521 F.Supp. at 1099. See also panel opinion, id., 716 F.2d at 1318 (Doyle, J., dissenting). As Judge Seymour stated, "Congress was completely clear when it terminated Uintah rights in the Gilsonite Strip. . . ." Id., 773 F.2d at 1098. Yet the operative provisions concerning the Gilsonite Strip used the same language as the 1902 (Uintah) Surplus Land Act and expressly restored the area "to the public domain" (Section 1, 25 Stat. 157). The en banc majority offered no reason why the restoration language contained in the 1902 Uintah Act should be interpreted differently, and there is none.[18]

3. The decision of the en banc majority is also at odds with the decisions of other courts of appeals in disestablishment cases. The Eighth and Ninth Circuits, in a long line of decisions, have consistently recognized that restoration to public domain language is an explicit expression of congressional intent to disestablish.[19] Also, decisions of the Tenth Circuit prior

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18. The dissent, on the other hand, relied upon the understanding of the parties regarding the effect of the 1888 Act in interpreting the 1902 Surplus Land Act, as amended. See Ute Indian Tribe, 773 F.2d at 1112.

19. See, e.g., Rosebud Sioux Tribe v. Kneip, 521 F.2d 87, 90 (8th Cir. 1975), aff'd, 430 U.S. 584 (1977); United States ex rel. Feather v. Erickson, 489 F.2d 99, 100 (8th Cir. 1973), rev'd on other grounds sub nom. DeCoteau v. District County Court, 420 U.S. 425 (1975); United States ex rel. Condon v. Erickson, 478 F.2d 684, 687-88 (8th Cir. 1973); Beardslee v. United States, 387

to Solem had also assumed that such language was synonymous with disestablishment.[20] The significance these decisions accorded to restoration to public domain language has a sound historical foundation and follows well-established principles regarding public lands. See Ute Indian Tribe, 773 F.2d at 1106 (Seth, J., dissenting). Long before the acts in question here, it was settled law that when the federal government appropriates or reserves a tract for any purpose, such as an Indian reservation, the tract is thereby severed from the public domain--that is, it loses its status as public land.[21] In 1889, for instance, the

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19. (Cont'd.) F.2d 280, 285 (8th Cir. 1967); DeMarrias v. South Dakota, 319 F.2d 845, 846 (8th Cir. 1963); Russ v. Wilkins, 624 F.2d 914, 915, 924 & 927-29 (9th Cir. 1980) (Hoffman, J., dissenting), cert. denied, 451 U.S. 908 (1981); United States v. Southern Pacific Transportation Co., 543 F.2d 676, 696 (9th Cir. 1976). See also Lower Brule Sioux Tribe v. State of South Dakota, 711 F.2d 809, 817 n.8 (8th Cir. 1983), cert. denied, 464 U.S. 1042 (1984); United States ex rel. Cook v. Parkinson, 525 F.2d 120, 124 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977); and Putnam v. United States, 248 F.2d 292, 295 (8th Cir. 1957).

District court and state court decisions in the disestablishment context have been to the same effect. See, e.g., Russ v. Wilkins, 410 F.Supp. 579, 581-82 (N.D. Cal. 1976), rev'd on other grounds, 624 F.2d 914 (9th Cir. 1980), cert. denied, 451 U.S. 908 (1981); United States ex rel. Condon v. Erickson, 344 F.Supp. 777, 778 (D.S.D. 1972), aff'd, 478 F.2d 684 (8th Cir. 1973); Leech Lake Band of Chippewa Indians v. Herbst, 334 F.Supp. 1001, 1005 (D. Minn. 1971); Stankey v. Waddell, 256 N.W.2d 117, 119 (S.D. 1977); Wood v. Jameson, 130 N.W.2d 95, 99 (S.D. 1964); and Lafferty v. State, 125 N.W.2d 171, 174 (S.D. 1963).

20. See Ellis v. Page, 351 F.2d 250, 251-52 (10th Cir. 1965); Toolsgah v. United States, 186 F.2d 93, 98, 104 (10th Cir. 1950) (Phillips, J., dissenting).

21. See, e.g., Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 513 (1839); Leavenworth, Lawrence, and Galveston Railroad Co. v. United States, 92 U.S. 733, 745 (1875); Hastings and Dakota Railroad Co. v. Whitney, 132 U.S. 357, 360-61 (1889); Bardon v. Northern Pacific Railroad Co., 145 U.S. 535, 539 (1892); Spalding v. Chandler, 160 U.S. 394, 404-05 (1896); Gibson v. Anderson, 131

Supreme Court remarked that:

> The doctrine first announced in Wilcox and Jackson, 13 Pet. 498, that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands . . . has been reaffirmed and applied by this court in such a great number and variety of cases that it may now be regarded as one of the fundamental principles underlying the land system of this country.

Hastings and Dakota Railroad Co., 132 U.S. at 360-61. Contrary to the en banc majority's view, because the reservation of a tract removed it from the public domain,[22] later restoration of the tract to the public domain firmly signified the end of reservation status.[23]

In sum, the en banc majority's interpretation not only is inconsistent with the decisions of the Supreme Court and the lower federal courts in Indian reservation boundary cases, but also

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21. (Cont'd.) F. 39, 41-42 (9th Cir. 1904); United States v. Techenor, 12 F. 415, 421 (D. Ore. 1882); Kansas Pacific Ry. Co. v. Atchison, Topeka & Santa Fe R. Co., 13 F. 106, 107 (D. Kan. 1881); and United States v. Payne, 8 F. 883, 893-94 (W.D. Ark. 1881). "Public domain" and "public lands" traditionally have been regarded as "equivalent" concepts. Barker v. Harvey, 181 U.S. 481, 490 (1901).

22. As the Solicitor of the Department of the Interior explained years later in regard to the original Uintah reservation, "[a]lthough the . . . reservation had been created out of the public domain, the land comprising it did not occupy the status of public domain land while included within the reservation. . . ." Solicitor Opinion M-36051, at 5 (December 7, 1950).

23. See Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942). The issue in that case was whether the Sioux Tribe was entitled to compensation for certain lands reserved for it by executive orders but later "'restored to the public domain' . . ." by the President. Id. at 325. In holding that no compensation was due, the Supreme Court expressly found that the two Executive Orders restoring the lands to the public domain (I Kappler 884-85, 899) "terminated the reservation. . . ." Id. at 330.

is untenable from an historical perspective. At the turn of the century, reservation status and public domain status were uniformly understood to be mutually exclusive. In construing restoration language as it has, the Tenth Circuit has thus attempted to "remake history," which the Supreme Court admonished "cannot" be done in order to resurrect a reservation that long ago ceased to exist. DeCoteau, 420 U.S. at 449; accord Rosebud, 430 U.S. at 615.

B. The Original Uintah Reservation was Disestablished Pursuant to the Act of May 27, 1902, as amended, and Today is Comprised Only of the Trust Lands

1. Governing Principles Support Disestablishment

As discussed above, the en banc majority misread Solem as changing the Supreme Court's analytical test for determining reservation disestablishment, and failed to apply the proper test when considering the legislation which opened the Uintah reservation and restored the unallotted lands to the public domain. Restoration to public domain language constitutes firm and unequivocal language for disestablishment (DeCoteau, 420 U.S. at 445-46), and demonstrates "an unmistakable baseline purpose of disestablishment" (Rosebud Sioux Tribe, 430 U.S. at 592).

The analysis of the "public domain" language in the 1902 Act as amended by subsequent acts is a key part of the analysis to determine whether or not the reservation was disestablished. The en banc majority did not consider this legislation in a manner consistent with relevant precedents, while the en banc dissent followed the correct analytical test and reached the correct result. Subsection 2 below is an analysis of the legislation

opening the reservation. It clearly shows a congressional intent to restore the surplus lands to the public domain and disestablish the reservation.

After disregarding clear language of disestablishment on the basis of its misreading of Solem, the en banc majority proceeded to ignore other factors that must be considered not only under Solem but also under the Supreme Court's prior decisions. Summarizing these decisions, the Court in Solem stated that when the area involved "has long since lost its Indian character, we have acknowledged that de facto, if not de jure, diminishment may have occurred. . . ." 465 U.S. at 471. Thus, "who actually moved onto opened reservation lands is . . . relevant to deciding whether a surplus land Act diminished a reservation. . . ." Id.

By focusing all its attention on Solem and treating it as setting forth new principles, the en banc majority blinded itself to the teachings of the Supreme Court's earlier decisions. In addition to the statutory language, "the 'surrounding circumstances,' and the 'legislative history' are to be examined" in interpreting surplus land enactments. Rosebud, 430 U.S. at 587. Accord, e.g., Solem, 465 U.S. at 469-70. The record here demonstrates that the en banc majority did not consider these factors in a manner consistent with the relevant precedents. Subsection 3 below reviews these other relevant factors. They vividly demonstrate that the decision below will not materially advance the interests of tribal sovereignty, and will severely hamper the functioning of State and local governments.

We now turn to a specific discussion of the legislation, legislative history, demographics and other circumstances surrounding the opening of the Uintah reservation.

2. The Uintah Reservation was Disestablished Pursuant to the Act of May 27, 1902, as amended

a. Creation of the Uintah Reservation

The Uintah reservation was created by President Abraham Lincoln by Executive Order in 1861 and included the entire area within the drainage basin of the Duchesne River, comprising approximately 2,039,040 acres (about 3,186 square miles). This was later confirmed by Congress in 1864 (13 Stat. 63). The various bands of the Ute Tribe were encouraged to move to the Uintah reservation so they would finally be settled in a designated area. See Ute Indian Tribe, 521 F.Supp. at 1092-1100, for a discussion of the creation and early history of the Uintah reservation.

b. Early Efforts to Restore Surplus Reservation Lands to the Public Domain--The 1902 Act

The period around the turn of the century witnessed an active effort by Congress and the President to disestablish large Indian reservations by making individual allotments to the Indians and then restoring the remaining lands to the public domain for settlement. This, Congress hoped, would facilitate the assimilation of Indians into the general society. The Uintah reservation was not the only reservation where the allotment and surplus program was instigated; it was happening in several other reservations in the West at about the same time

period. See General Allotment Act of 1887 (24 Stat. 388); DeCoteau at 432-33; and Solem at 466-67.

The Uintah reservation contained vast areas of land in excess of the lands needed to satisfy the allotments to the Indians. Therefore, Congress enacted the Act of May 27, 1902 (32 Stat. 245), which was the Indian Appropriations Act for that year, and included a provision restoring any lands not allotted to the Indians to the public domain. The relevant portion of the Act states:

> That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: . . . (Emphasis added).

Thus, the original 1902 Act authorizing the opening of the reservation contained "public domain" language which is language "precisely suited" to disestablishment. DeCoteau, supra, at 445-446. Again, in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), the Supreme Court held that language restoring surplus reservation land to the public domain (even though the original act was amended to provide for a different method of opening) demonstrated "an unmistakable baseline purpose of disestablishment." Id. at 592. See also Seymour v. Superintendent, 368 U.S. 351 (1962).

An important observation is that, in 1902, Congress believed the consent of the Indians had to be obtained before their lands

could be allotted and the surplus restored to the public domain and thus opened to private settlement and entry under the public land laws. Efforts to obtain the consent of the Indians to allotment were unsuccessful within the time limits set forth in the 1902 Act and Congress was forced to take further action with regard to opening the Uintah reservation. However, this task was made easier by the Supreme Court's decision in Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), which held that Congress had exclusive and plenary power to deal with reservation lands, without the necessity of obtaining the approval or consent of the Indians.

c. Action After the 1902 Act

Reacting to the latitude confirmed by the Supreme Court in Lone Wolf, supra, Congress promptly enacted the Act of March 3, 1903 (32 Stat. 982), which directed that the Uintah reservation should be allotted and the surplus lands opened for settlement and entry under the public land laws.24/ In 1904 Congress again extended the time for the opening to March 10, 1905, so that surveying could be completed and allotments made (33 Stat. 207).

In the meantime, on April 27, 1903, the Commissioner of Indian Affairs prepared instructions for United States Indian Inspector James McLaughlin regarding the opening of the Uintah

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24. It is worthy of note that it took Congress fewer than sixty days following the decision of the Supreme Court in Lone Wolf in which to mandate the opening of the Uintah reservation without the consent of the Indians.

reservation. The Department of Interior viewed the administrative task under the 1903 Act to be one of making allotments to the Indians and restoration of the surplus lands to the public domain as set forth in the 1902 Act. In May of 1903, Inspector McLaughlin met with the Utes in the Uinta Basin to explain to them that the reservation was to be terminated without their consent and that allotments would be made. The following extract from the transcript of that meeting clearly shows McLaughlin's understanding that the reservation boundaries were to be extinguished (JX 162, pg. 42):

> Inspector McLaughlin:
>
> A number of your speakers have said that you do not want your land stolen from you. My friends, these hills, these streams, these valleys will all remain just as they are. There will be no change in the nature of the country but the improvements that will come when white people come in among you. My friends, Red Cap said my talk was cloudy, and you do not understand it. You are the people who are in the dark in regard to the force of this act of congress, and I am trying to bring you into the light. You say that line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will pull up the nails which hold down that line and after next year there will be no outside boundary line to this reservation. (Emphasis added).[25]

d. The Act of March 3, 1905

The time set by the 1904 Act for opening the reservation (March 10, 1905) was running out. Early in 1905, the

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25. For a more detailed version of McLaughlin's negotiations with the Indians, see JX 162, pp. 42-45. A subsequent report of McLaughlin, summarizing his meetings with the Utes, can be found at LD 101, pp. 9-12.

Department of Interior had not been able to complete surveys of reservation land in order to make the allotments, so that the excess lands could in turn be ascertained and restored to the public domain. This delay prompted the Senate, on February 4, 1905, to demand an explanation from the Secretary of the Interior as to why he apparently was not going to meet the March 10 deadline (see LD 101 at p. 1). The Secretary reported promptly, under date of February 15, 1905, setting forth the progress that had been made, and explaining, inter alia, that the Department had experienced difficulty in completing land surveys so that allotments could be made and this had prevented a timely completion of the allotment program. He thus made clear the need for an extension of time in which to complete the allotment program.

Accordingly, by the Act of March 3, 1905 (33 Stat. 1048), Congress extended the effective date for terminating the reservation from March 10, 1905, to September 1, 1905. The Act provided in relevant part:

> That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; . . .
>
> That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the act of Congress of May twenty-seventh, nineteen hundred and

> two, such portions of the lands within the Uintah Indian Reservation as he considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: Provided, That the proceeds from any timber on such addition as may with safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in accordance with the provisions of the act opening the reservation. (Emphasis in original.)

e. The Relationship Between the 1902 and 1905 Acts

The en banc majority thought the 1905 Act (33 Stat. 1069), extending the time for opening, supplanted the 1902 Act (32 Stat. 263), restoring the lands to the public domain. Compare Ute Indian Tribe, 773 F.2d at 1089 with id. at 1111-12 (Seth, J., dissenting). That reasoning is flawed and is not supported by the Acts, the legislative history or surrounding circumstances.

It is true that the 1905 Act does not specifically repeat the "public domain" language of the 1902 Act. Rather, the 1905 Act contained a provision that the unallotted lands were to be disposed of under "the general provisions of the homestead and townsite laws, . . . and shall be opened to settlement and entry by proclamation of the President." But the 1905 Act did not purport to change whether there should be a disestablishment. That had already been clearly stated in the 1902 Act. The 1905 Act merely addressed the manner and procedures for accomplishing disestablishment. There is no conflict or inconsistency between the two.

The provision in the 1905 Act that the surplus lands were to be disposed of under the homestead and townsite provisions of the public land laws certainly does not constitute a restriction to the declaration in the 1902 Act that the lands were to be restored to the public domain. The intent of the 1902 Act was carried over into the 1905 Act.

The circumstances surrounding the Uintah reservation opening are similar in many respects to those in Rosebud, supra, where the Supreme Court found there to be a diminishment of reservation boundaries. In Rosebud, the Court held that the operative language of the original act demonstrated "an unmistakable baseline purpose of disestablishment" (430 U.S. at 592) even though the opening of the reservation was actually implemented by subsequent legislation. The same is true for the Uintah reservation legislation in that each later act merely builds on the original act and deals primarily with extending the time for opening.26/

The legislative history of the 1905 Act, however, demonstrates that Congress was implementing, not abandoning, the 1902 Act's baseline purpose to end the Uintah reservation. Compare S. Rep. No. 4240, 58th Cong., 3d Sess., at 14-16 (1905) (letters of the Commissioners of Indian Affairs and the General Land Office) with Ute Indian Tribe, 773 F.2d at 1112 (Seth, J., dissenting) ("[n]othing in the Congressional debates suggests an attempt to

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26. On this point, the Tenth Circuit's en banc decision is contrary to its views as expressed in Hanson v. U.S., 153 F.2d 162 (10th Cir. 1946), where it was concluded that the 1905 Act merely extended the date of opening and did not alter or affect the operative terms of the 1902 Act.

change the 1902 intent. . ."). See also, debates at 39 Cong. Rec. 1181-1185, 3522 (Jan. 21, 1905, LD 103).

What Congress was actually concerned about in 1905 (other than a speedy conclusion of the allotment process) was that land speculators might deprive bona-fide homesteaders of the land. See "Indian Appropriations Bill, 1906," Hearings, Subcomm. of the Senate Comm. of Indian Affairs, 39th Cong., 3d Sess. (1905, LD 100 at 30). Nowhere in the cited subcommittee debates is there any statement that the purpose of the limitations on entry was to keep the reservation intact. To the contrary, the pertinent discussion reveals that even with such limitations the land would still be restored to the public domain. Senator Teller, one of the advocates of the limitation on entry stated at the hearings: "I am not going to consent to any speculators getting public land if I can help it" (Senate Subcommittee Hearings, supra, LD 100 at 30) (emphasis added). Further, there is nothing in the congressional debates or reports to indicate that Congress ever intended or desired to preserve the original exterior boundary of the Uintah reservation.

The real purpose and intent of the 1905 Act was not only to implement the restoration of the surplus lands to the public domain as provided in the 1902 Act, but also to allow entry and settlement of such lands only under the homestead and townsite laws in order to prevent speculation. Limitations on entry such as those contained in the 1905 Act are not inconsistent with the previously expressed intent of Congress to restore surplus lands to the public domain and disestablish the reservation. Again,

the cumulative series of acts in this case can be compared to those in Rosebud where the Supreme Court held there to be a disestablishment. Rosebud at 592.

That the 1905 Act carried the 1902 Act into effect is further clearly demonstrated by the Presidential Proclamation opening the original Uintah reservation for entry and settlement. The Presidential Proclamation of July 14, 1905 (34 Stat. 3119), employing much the same format as that used in the 1904 Rosebud Proclamation, provided:

> Whereas it was provided by the Act of Congress, approved May 27, . . . 1902 (32 Stat., 263), among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation, in the State of Utah, "shall be restored to the public domain: . . . ."
>
> And, whereas, the time for the opening of said unallotted lands was extended to October 1, 1904, by the Act of Congress approved March 3, 1903 (32 Stat., 998), and was extended to March 10, 1905, by the Act of Congress approved April 21, 1904 (33 Stat., 207), and was again extended to not later than September 1, 1905, by the Act of Congress, approved March 3, 1905 (33 Stat., 1069), which last named act provided, among other things:
>
> [The Act is here quoted]
>
> Now, therefore, I . . . do hereby declare . . . that all the unallotted lands in said reservation, excepting such as have at that time been reserved . . ., and such mineral lands as may have been disposed of . . ., will on and after the 28th day of August, 1905, in the manner hereinafter prescribed, and not otherwise, be opened to entry, settlement, and disposition under the general provisions of the homestead and townsite laws of the United States. . . .

34 Stat. at 3119-20 (emphasis added).

The President thus clearly understood that the 1905 Act was implementing--not deviating from--the purpose of disestablishment

underlying the 1902 Act. The 1905 Proclamation is similar to the one involved in Rosebud and constitutes an "unambiguous, contemporaneous, statement, by the Nation's Chief Executive of a perceived disestablishment. . ." (id., 430 U.S. at 602-03), and unmistakably reflects the intent of Congress. See id. at 603. On this subject the en banc majority opinion is again silent.

3. Additional Considerations Support Disestablishment

In addition to examining the legislation opening a reservation, the Supreme Court has stated that another component of its "fairly clean analytical structure" is to examine the subsequent history of the area:

> On a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land act diminished a reservation. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that de facto, if not de jure, diminishment may have occurred. See Rosebud Sioux Tribe v. Kneip, supra, at 588, n 3, and 604-605, 51 L Ed 2d 660, 97 S Ct 1361; Decoteau v. District County Court, 429 US at 428, 43 L Ed 2d 300, 95 S Ct 1082. In addition to the obvious practical advantages of acquiescing to de facto diminishment, we look to the subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers.

Solem, 465 U.S. at 471.

The Court further noted that:

> When an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian Country seriously burdens the administration of State and local governments.

Solem at 471, n.12.

In Rosebud, the Court stated:

> The fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority, is a factor entitled to weight as a part of the "jurisdictional history." The long-standing assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts. . .

Rosebud, 430 U.S. at 604-05. We will now briefly examine several additional factors which strongly support disestablishment.

a. Subsequent Administrative and Congressional Recognition of Termination

The 1905 Presidential Proclamation, discussed supra, which opened the reservation, does not stand alone in its reference that the surplus lands were restored to the public domain. The understanding of other responsible government officials has, until recent years, consistently mirrored President Roosevelt's construction.27/ Many of the documents cited in the

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27. See, e.g., Letter of the Acting Commissioner of Indian Affairs to the Secretary of Interior, dated May 11, 1905, at 3 (JX 463); Letter of the Acting Secretary of Interior, dated September 3, 1909; Letter of the Commissioner of the General Land Office to Senator Reed Smoot, dated December 20, 1909; Letter of the Secretary of Interior to Senator Reed Smoot, dated January 12, 1911; H.R. Doc. No. 892, 62d Cong., 2d Sess., at 1-2 (1912) (Joint Report of Inspector James McLaughlin and the Chief Supervisor); H.R. Doc. No. 1250, 63d Cong., 3d Sess., at 1-2 (1914) (Letter of the Secretary); Letter of the Commissioner of the General Land Office to the Commissioner of Indian Affairs, dated September 28, 1922, at 1 (JX 403); Letter of the Commissioner of Indian Affairs, dated December 1, 1927, at 2; 54 I.D. 559, 561-62 (1934) (JX 431); Solicitor Opinion M-33626, at 2 (August 3, 1944); Secretarial Order, 10 Fed. Reg. 12409 (1945) (LD 183); 59 I.D. 393 (1947); Solicitor Opinion M-36051, at 1-2, 5 (December 7, 1950); Appeal of Edward M. Brown, A-26523, at 1-2 (December

margin expressly recognize that, with respect to the original Uintah reservation, the unallotted and unreserved lands were restored to the public domain under the provisions of the 1902 Act. The record shows as well that officials of the Interior Department treated the original Uintah reservation as having been disestablished. Thus, with the opening of the reservation in 1905, Department officials immediately began referring to the original area as the "former" reservation. For decades after the opening, Interior officials consistently administered only the trust lands (the tribal grazing reserve, the allotments, and the lands later restored to tribal ownership and reservation status) as the Tribe's existing reservation,[28] a practice that continued until recently.[29]

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27. (Cont'd.) 11, 1952); Appeal of Charles B. Gonsales, at 1 (January 23, 1953); and Secretarial Order, 36 Fed. Reg. 19920 (1971) (LD 210).

28. See, e.g., H.R. Rep. No. 5010, 59th Cong., 1st Sess., at 1-2 (1906) (Letters of Secretary of Interior and Commissioner of Indian Affairs); Presidential Proclamation dated September 1, 1906, 34 Stat. 3228; Letter of the Acting Commissioner of Indian Affairs, dated September 26, 1907, at 1 (JX 336); Letter of the First Assistant Secretary of the Interior to the Commissioner of Indian Affairs, dated November 8, 1907, at 1 (JX 338); H.R. Doc. No. 1279, 60th Cong., 2d Sess., at 2-3 (1909) (1908 Letters of Secretary and Commissioner of Indian Affairs); Letter of the Secretary of Interior, dated December 19, 1908, at 1, 2, 4 & 6 (JX 341); and 39 I.D. 79 (1910) (Acting Secretary of Interior). See also 34 I.D. 549, 549-50 (1906) (Ass't. Attorney General).

29. See, e.g., 773 F.2d at 1105 (Seth J., dissenting); S. Doc. No. 78, 66th Cong., 1st Sess., at 1 (1919) (Letter of the Secretary of the Interior); 1929 Annual Report of the Uintah & Ouray Agency, at 1 (JX 420); 1931 Agency Grazing Report, at 1, 3 (JX 424); 1931 Annual Agency Report, at 4 (JX 425); 1932 Annual Agency Report, at 1 (JX 427); H.R. Rep. No. 370, 77th Cong., 1st Sess., at 3 (1941) (Report submitted by Secretary of Interior); Phoenix Area Office, Information Profiles of Indian Reservations in Arizona, Nevada & Utah, at 155 (1976) (JX 480).

Subsequent legislation and other congressional materials are to the same effect.30/ Numerous congressional documents subsequent to the 1905 opening contain references to the "former" reservation. See for example, Senate Report No. 219, 61st Cong. 2d Sess., Feb. 14, 1910 (LD 138) entitled "Making Available Lands On Former Uintah Indian Reservation," (emphasis added).31/

It should be noted that these numerous and repeated references in congressional documents were consistent with the policy of the day of disestablishing Indian reservations and assimilating the Indians into society.

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30. See, e.g., Act of July 20, 1912, 37 Stat. 196; S. Rep. No. 139, 59th Cong., 1st Sess., at 1 (1906); H.R. Rep. No. 291, 59th Cong., 1st Sess., at 1 (1906); S. Rep. No. 893, 62d Cong., 2d Sess., at 1-2 (1912); H.R. Rep. No. 943, 62d Cong., 2d Sess., at 1-2 (1912); S. Rep. No. 979, 69th Cong., 1st Sess., at 1-2 (1926); H.R. Rep. No. 2047, 69th Cong., 2d Sess., at 2 (1927); and 74 Cong. Rec. 3408 (1931). Characteristic of Congress' treatment is the Act of July 20, 1912, which provided that:

> any person who has heretofore made a homestead entry for land which was formerly a part of the Uintah Indian Reservation in the State of Utah, authorized by the Act approved May twenty-seventh, nineteen hundred and two, and Acts amendatory thereto. . . .

37 Stat. 196 (emphasis added). See also Rosebud, 430 U.S. at 603, n.25.

31. For other past tense references to the "former" reservation, see: Congressional Floor Debates, Jan. 15, 1906, p. 1064 (LD 116); Senate Bill 321, Jan. 27, 1906 (LD 120); H.R. Rep. No. 823, Feb. 9, 1906 (LD 122); S. Rep. No. 2561--Indian Appropriations Bill, p. 131, April 13, 1906 (LD 124); S. Rep. No. 4263, June 12, 1906 (LD 126); Public Law 258 (H.R. 15331, pp. 375-76) June 21, 1906 (LD 127); H.R. Rep. No. 5010, June 25, 1906 (LD 128); Senate Bill 6375 (P.L. 345) June 29, 1906 (LD 129); P.L. 104--Indian Appropriations Bill, p. 95, April 30, 1908 (LD 135); P.L. 144--Indian Appropriations Act, p. 285, April 4, 1910 (LD 139); P.L. 434--Indian Appropriations Act, p. 1074, March 31, 1911 (LD 141); P.L. 717, 70 Stat. 546, 548, July 14, 1956 (LD 203).

Judicial pronouncements also follow suit. In decisions rendered prior to Ute Indian Tribe, the courts interpreted the 1905 Act as merely amending, not superseding, the 1902 Act.[32/] Indeed, in 1946, the Tenth Circuit expressly held in Hanson v. United States--a decision unaccountably ignored by the en banc majority--that the unalloted and unreserved lands of the original Uintah reservation were "restored to the public domain by the Act of May 27, 1902. . . ." Id. at 163. The Utah Supreme Court likewise recognized the restoration of the unallotted lands to the public domain under these Acts. Sowards, 108 P. at 1114. Finally, in a different context, the United States Supreme Court recognized that the Tribe's reservation was considered to be only those lands held in trust by the federal government. Affiliated Ute Citizens v. United States, 406 U.S. 128, 141 (1972).

Moreover, by holding that the original Uintah reservation remains intact, the en banc majority has created what must be one of the few--if not the only--Indian reservations engulfing a national forest. The district court and the panel of the court of appeals agreed that such an anomaly was not intended and that the forest provisions of the Act of March 3, 1905, 33 Stat. 1048, 1069-70, which set aside more than 1 million acres "as an addition to the Uintah Forest reserve, subject to the laws, rules and regulations governing forest reserves," thereby diminished the

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32. See Hanson v. United States, 153 F.2d at 162-63; Uintah and White River Bands of Ute Indians, 139 Ct.Cl. at 5-6 & 21-22; United States v. Boss, 160 F. 132, 132-33 (D. Utah 1906); and Sowards v. Meagher, 108 P. 1112, 1114 (Utah 1910).

original Uintah reservation. Ute Indian Tribe, 716 F.2d at 1313-14. The en banc majority thought, incorrectly, that under Solem the transfer of the administration of these one million acres from the Interior Department to the Department of Agriculture and the fact that Congress later compensated the Tribe for its interest in the forest lands were not inconsistent with continued reservation status. Despite the fact, as the federal district court stated, that the "status and purpose of national forest lands are distinct from the status and purpose of Indian reservations" (Ute Indian Tribe, 521 F.Supp at 1138), the en banc majority apparently believed that under Solem this could be ignored and that the Tribe therefore had jurisdiction within the national forest (Ute Indian Tribe, 773 F.2d at 1090). There is, however, nothing in the Court's Solem opinion that justifies such an extraordinary result. Congress clearly ended the original Uintah reservation on the land withdrawn for a national forest, which further demonstrates its intent to disestablish the reservation itself.

The United States supported the Ute Tribe as amicus curiae in the recent federal litigation with respect to the Uintah reservation. In so doing, the United States failed to acknowledge the inconsistency of that position with its position in other litigation involving this reservation. In Uintah and White River Bands of Ute Indians v. United States, 139 Ct.Cl. 1 (1957), it entered into a stipulation with which the Court of Claims agreed (139 Ct.Cl. at 5-6, 22) which quoted the 1902 Act and then succinctly stated the critical point: "Pursuant to this [1902] Act and

amendments thereto, . . . allotments in severalty . . . . were made to the Uintah and White River Indians, and surplus lands . . . . were restored to the public domain, and opened for disposition under the public land laws for the benefit of the Indians" (emphasis added). What is more, the United States (and the Utes) consistently and repeatedly maintained that the original Uintah reservation was a former reservation; and throughout its opinion and findings, the Court of Claims also treated the original Uintah reservation as having ended. E.g., 139 Ct.Cl. at 2, 25, 28, 56, 64, 69 and 70. It is also worthy of note that when the Ute Indian plaintiffs appeared in the Court of Claims, they summed it up well: "Now, the Act of May 27, 1902, comes as a matter of particular importance in this suit because that is the Act as amended under which the Uintah Reservation was ultimately broken up."33/

b. Subsequent Demographic History Supports Disestablishment

Here, the demographic history of the area demonstrates that the en banc majority's decision will not materially advance the interests of tribal sovereignty (which has for the past 60 years been exercised primarily on the trust lands), but will seriously hamper the functioning of State and local governments in a myriad of areas. The disputed area "lost its Indian character" long ago. It is "predominantly populated by non-

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33. Opening statement in testimony for plaintiff, Uintah and White River Band of Utes v. U.S., No. 47569, U.S. Court of Claims at p. 195 (Jan. 11, 1954).

Indians," approximately 18,000 of them,[34] with only about 1,500 tribal members, who are living mainly on trust lands. Ute Indian Tribe, 773 F.2d at 1105 (Seth, J., dissenting). The non-Indians are the ones "who actually moved onto the opened reservation lands" and have been there ever since. Thus, there has indeed been a de facto or de jure disestablishment. It is their "justifiable expectations," built up over a 60-year period, that would be upset if it were to be held that the original boundaries are still intact and it is their interests the en banc majority ignored, despite the United States Supreme Court's command that such factors must be taken into account. E.g., Rosebud, 430 U.S. at 605; and Solem, 465 U.S. at 471.

Under the en banc majority's result, the Ute Tribe would preside over an area owned and predominantly populated by non-Indians and, hence, in which the Tribe has little presence and no real interest as a sovereign. At the same time, State and local authority would be significantly limited despite the fact that this area has principally been the concern and responsibility of these governments, not the Tribe. This would include increased tribal court jurisdiction over all residents of the area, and diminished state court jurisdiction.

The testimony and exhibits introduced in the federal district court clearly establish that the State and its local governmental divisions had exercised primary jurisdiction within the historic

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34. U.S. Dept. of Commerce, Bureau of Census, General Population Characteristics Utah, Table 15, p. 46-12 (1980).

reservation area subsequent to the opening, except on the trust lands. The early jurisdictional history of the disputed area shows that the Indians of the Uintah and Ouray Agency (the White River, Uintah and Uncompahgre Utes) were, after the historic reservation was opened to settlement, generally subject to the laws of the State of Utah within those areas so opened (excluding trust lands).[35] For example, in the Annual Report of the Superintendent of the Uintah and Ouray Agency for 1916 (JX 380), it was stated as follows:

> The Indians of this Jurisdiction are citizens of the State of Utah, and voters, and the present Superintendent has not assumed any jurisdiction over their persons. Where offences have been committed against the laws of the State, the matter has been reported to the County authorities and the agency officials have endeavored to co-operate with the County authorities in the maintenance of law and order.

Id. at 2-3. Other documentary evidence also demonstrates that the State exercised jurisdiction within the historic reservation area beginning in the early 1900's.[36]

The primary evidence regarding the more recent jurisdictional history of the disputed area was the testimony of various State and local officials introduced at the federal district court trial. This testimony shows that until recently the State continued

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35. See, e.g., JX 344; JX 354 at 2-3; JX 368 at 2-3; JX 380 at 2; JX 386 at 4-5; JX 393 at 3-4; JX 396; JX 397 at 2; JX 399 at 2; JX 412 at 1; JX 415 at 1-3; JX 417 at 1-2; and JX 420.

36. See also letter from District Superintendent, Indian Field Service, August 5, 1926 (JX 412); Annual Report of the Superintendent of the Uintah and Ouray Agency, 1917 and 1918; JX 386 at 4-5; JX 393 at 3-4. See also Trial Tr. at 269 and 277-78 (testimony of George Marett, Sheriff of Duchesne County).

to exercise primary jurisdiction within the historic reservation area, except on the trust lands.[37]

The evidence introduced in this case regarding the exercise of jurisdictional authority by the Tribe also confirms that the State and local governmental subdivisions have, until recently, exercised primary jurisdiction within the historic reservation area, except on the trust lands.[38]

Finally, until recently the Ute Tribe itself treated only the trust lands as the Tribe's post-1905 reservation.[39] As the dissent in Ute Indian Tribe observed:

> Statements made by the Utes themselves also tend to detract from their position. For example, the 1957 Ute Ten Year Development Program provides a description of the total acreage of the Uintah and Ouray reservation as currently containing 1,010,000 acres. . . .

773 F.2d at 1114.

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37. See Trial Tr. at 106 (testimony of Clair Huff, Utah Division of Wildlife Resources); 121 (testimony of Norman Hancock, Division of Wildlife Resources); 158-59 (testimony of David Thomas, Division of Wildlife Resources); 186-87 (testimony of Edward Tuttle, Utah Division of Parks and Recreation); 220 (testimony of Donald Smith, Utah Division of Wildlife Resources); 251 (testimony of C. Blake Feight, Utah Division of Oil, Gas & Mining); 267, 270-74, 277-79 and 281-89 (testimony of George Marett, Duchesne County Sheriff); and 298-99 (testimony of Ray Wardle, member and Chief of Tribal Police, cross-deputized by Uintah County).

38. See, e.g., Trial Tr. at 121 and 135 (testimony of Norman Hancock); 159 (testimony of David Thomas); 174 (testimony of Gordon Harmston, Utah Department of Natural Resources); 187 (testimony of Edward Tuttle); 228 (testimony of Charles East); 251 (testimony of C. Blake Feight); 262-63 (testimony of Alfred Parriette, Tribe's Division of Wildlife Management and Law Enforcement); and 294-300 (testimony of Ray Wardle).

39. See, e.g., 1957 Ute Ten-Year Development Program, at 66-68 (JX 465); 1966 Review and Revision of the Uintah & Ouray Indian Reservation-Wide Program, at 7, 8; and 1969 Annual Report of the Uintah Indian Tribe, at 1 (JX 473).

Further, for many decades the Ute Tribe has maintained signs at the boundaries of the trust lands, advising the public that they were entering the "Uintah and Ouray Indian Reservation." These signs were clearly intended to designate what the Tribe thought were the reservation boundaries. The signs have been replaced from time to time over the years (with the signs in more recent times being more elaborate), but they have always indicated that the boundaries of the trust lands were the reservation boundaries.40/

In short, the record is clear that until recent years the Tribe never attempted to exert any significant jurisdictional authority off the trust lands. The history of the area in dispute shows that it has long been the responsibility of State and local governments, is overwhelmingly populated by non-Indians, and has lost its Indian character virtually from the opening of the reservation in 1905.

Applying the analytical test developed by the United States Supreme Court to the legislation, facts and circumstances surrounding the opening of the original Uintah reservation, the conclusion must be that the reservation was disestablished and the surplus lands which were restored to the public domain are not part of the reservation--nor do they constitute Indian country as

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40. See, for example, the testimonies of Dave Thomas (Tr. 155-57) and Gordon Harmston (Tr. 176-77). A series of photographs of such signs located at trust land boundaries, as such signs appeared on March 22, 1977, were introduced at trial as Ex. I-4B, coordinated with Ex. I-4A, indicating the precise locations where the various photographs were taken.

defined by 18 U.S.C. 1151. Therefore, the state district court had jurisdiction in this matter.